Lou's Transport, Inc. and T.K.M.S., Inc.[1] ***and*** **Michael Hershey.** Case 07–CA–102517

July 24, 2018

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On January 25, 2018, Administrative Law Judge Kimberly R. Sorg-Graves issued the attached supplemental decision. The Respondent filed exceptions and a brief in support, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lou's Transport, Inc. and T.K.M.S., Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall pay Michael Hershey the following amounts, which total $49,817, plus interest accrued on the net backpay, bonuses, and interim expenses to the date of payment at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required on the backpay and bonuses by Federal and State laws.

Net Backpay:	$11,683
Bonuses:	$ 5267
Interim Expenses:	$21,354
401(k) Non-taxable Distribution:	$11,513
TOTAL:	$49,817

It is further ordered that the Respondent reimburse Michael Hershey for any additional estimated lost 401(k) gains to the date of payment, calculated using the same method to calculate lost 401(k) gains set forth in the compliance specification.

It is further ordered that the Respondent reimburse Michael Hershey for any adverse tax consequences of receiving a lump-sum backpay award, allocating the backpay award to the appropriate calendar years as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).[3]

Dated, Washington, D.C. July 24, 2018

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Dynn Nick, Esq., for the General Counsel.
Steven A. Wright and *Amy D. Comito, Esqs.* (Steven A. Wright, P.C.), for the Respondent.
Michael Hershey, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. These supplemental proceedings were tried before me in Detroit, Michigan on September 18, 2017, pursuant to a compliance specification and notice of hearing that issued by the National Labor Relations Board, Region 07 on November 6, 2015, and was later amended on June 27, 2016, December 8, 2016, August 3, 2017, and August 14, 2017. At the commencement

[1] We amend the caption to correct the name of Respondent T.K.M.S., Inc.

[2] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that unemployment compensation payments are not interim earnings under Board law, we do not rely on her citation to *Paint America Services*, 353 NLRB 973 (2009), a two-member Board decision. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Instead, we rely on *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951).

[3] Schedule J of the compliance specification calculates that there would have been no adverse tax consequences as a result of Hershey receiving the lump-sum backpay amount calculated in the compliance specification in 2017, but that calculation may change based upon the year in which the payment is rendered.

of the hearing, I granted General Counsel's oral motion to amend the fourth amended compliance specification issued on August 14, 2017, to correct some mathematical errors and to admit it into the record as GC Exh. 1(qq). (Tr. 11–13; GC Exhs. 1(ii) and 1(qq).)[1] I also granted Lou's Transport, Inc. and T.K.S., Inc.'s (Respondent) oral motion to amend its answer to the fourth amended compliance specification by removing the document at page 4 of its answer, which is a 1-page excerpt from the transcript of the underlying unfair labor practice hearing, and all references to that document. (Tr. 8–9; GC Exh. 1(oo).) Respondent's amended answer serves as its answer (Respondent's Answer) to the amended fourth amended compliance specification (Compliance Specification). (GC Exh. 1(oo) and (qq).)

General Counsel contends that the Compliance Specification alleges the amount of backpay and compensation for other benefits due to Michael Hershey (Hershey or Charging Party) under the terms of the Board's decision and order in *Lou's Transport, Inc.*, 361 NLRB 1446, 1448 (2014). In its decision, the Board found that Respondent had discharged Hershey in violation of Section 8(a)(1) of the Act because of his protected concerted activity protesting the safety conditions of the roads and the poor maintenance of the trucks that drivers were required to drive in a mine where they were performing work. The Board's order in *Lou's Transport, Inc.* was enforced by the U.S. Court of Appeals for the Sixth Circuit in *Lou's Transport, Inc., v. NLRB*, 644 Fed.Appx. 690 (6th Cir.2016), 205 LRRM (BNA) 3651 (April 6, 2016).

The Board's enforced order, in pertinent part, requires Respondent to take the following affirmative actions:

> (a) Within 14 days from the date of this Order, offer Michael Hershey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
> (b) Make Michael Hershey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as modified.
> (c) Compensate Michael Hershey for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. . . .
> (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

In making my findings and conclusions, I have considered the entire record, and have had an opportunity to observe the demeanor of the witnesses at the hearing. I have also considered the briefs filed by the General Counsel and the Respondent.

POSITIONS OF THE PARTIES

General Counsel asserts in the Compliance Specification that the appropriate backpay period for Hershey was from March 27, 2013, to August 22, 2016, and that Respondent owes Hershey $11,683 in net backpay (gross backpay minus 5% for 401(k) contributions and minus interim earnings), $5267 in bonuses, $11,513 in 401(k) non-taxable distributions, $21,354 in interim expenses, $495 in consequential economic harm, all totaling $50,312, plus reimbursement for any excess tax liability on Hershey's part due to the lump sum backpay payment, plus interest through the date of payment. (GC Exh. 1(qq).)

As is set forth in Respondent's Answer to the Compliance Specification, Respondent asserts that General Counsel made multiple errors in the methods used to compile the Compliance Specification. (GC Exhs. 1(oo) and (qq).) Respondent asserts that Hershey's higher hourly wage during his interim employment supports its claim that he is not owed backpay. Respondent contends that the Compliance Specification contains errors in failing to properly offset Hershey's interim earnings against the backpay liability. Respondent contends that General Counsel erred in its computation of backpay by using the wrong backpay period, the wrong comparable employees, and the wrong wage rate in some of its calculations. Respondent further contends that General Counsel erred by disparately calculating overtime pay, and by failing to deduct union dues, uniform expenses and unemployment insurance payments from the backpay amount. Also, Respondent asserts that General Counsel erred by using the wrong work location to calculate mileage in computing interim expenses and by not offsetting the interim expenses against interim earnings. Finally, Respondent opposes the inclusion of employer matched 401(k) contributions and projected interest on the 401(k) benefit reimbursement calculated in the Compliance Specification.[2]

OVERVIEW OF LEGAL STANDARDS

The Board has noted that a loss of employment as the result of an unfair labor practice is presumptive proof that some backpay is owed. *St. George Warehouse* (*St. George Warehouse I*), 351 NLRB 961, 963 (2007). In a compliance proceeding the General Counsel has the burden of proving the amount of gross backpay due each discriminatee. Id.; *Florida Tile Co.*, 310 NLRB 609 (1993). See also, *NLRB v. S.E. Nichols of Ohio,* 704 F.2d 921, 924 (6th Cir.1983), cert. denied 464 U.S. 914 (1983); NLRB Casehandling Manual (Part Three) Compliance, Section 10532.3 (CHM Section). In *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001), the Board noted:

[1] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "R. Exh." for Respondent's Exhibits, and "U. Exh." for the Union's Exhibits. Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

[2] Respondent did not oppose the Compliance Specification's determination that no excess tax penalty will result from the lump payment of the total backpay liability assessed in the Compliance Specification or the appropriateness of interest being due on the backpay liability to the date of its payment. Therefore, those determinations in the Compliance Specification are not directly addressed herein.

> Both the Board and the Court have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). The Board is required only to adopt a formula which will give a close approximation of the amount due; it need not find the exact amount due. *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir. 1987), citing *NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963). Nonetheless, the objective is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action. *American Mfg. Co. of Texas*, 167 NLRB 520 (1967); CHM Section 10532.1.

The comparable or representative employee approach is an accepted methodology on which to base backpay calculations. *Performance Friction Corp.*, supra at 1117. After the General Counsel has established the amount of gross backpay due to the discriminatee, the Respondent then has the burden of establishing affirmative defenses to mitigate its liability. *St. George Warehouse I*, supra, at 963; *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007).

"Another well-established principle is that, where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer." *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980) (enf'd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982). See also, *F. M. Broadcasting Corporation d/b/a WHLI Radio*, 233 NLRB 326, 329 (1977). In *United Aircraft Corp.*, 204 NLRB 1068 (1973), the Board stated that "the backpay claimant should receive the benefit of any doubt rather than the [r]espondent, the wrongdoer is responsible for the existence of any uncertainty and against whom any uncertainty must be resolved."

Issues

A. Was net backpay calculated correctly in the Compliance Specification?

1. Was the correct backpay period used?

The Compliance Specification assumes the backpay period to be from the date of Hershey's discharge, March 27, 2013, to August 22, 2016, at which time Hershey failed to timely respond to Respondent's unequivocal and unconditional offer of reinstatement. (Tr. 19; GC Exh. 1(qq) at para. 4.) Respondent agrees that the backpay period started on March 27, 2013, but contends that it ended on November 24, 2014, when Hershey testified in the underlying unfair labor practice hearing that he did not want to be reinstated by Respondent. (Tr. 137.)

I reject Respondent's contention that Hershey's testimony during the unfair labor practice hearing that he did not want to be reinstated by Respondent tolled the backpay liability period. Respondent contends that these statements by Hershey excused it from following Board precedent and the Board order in this matter to "offer Michael Hershey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed" in order to toll backpay liability. Respondent's questions about reinstatement posed to Hershey during the unfair labor practice hearing did not meet the specific standards required in making an unconditional offer of reinstatement and allowing a reasonable time to accept that offer, and therefore, Hershey's rejection of reinstatement under those circumstances does not toll backpay liability. *Spitzer Akron, Inc.*, 195 NLRB 114, 114 (1972); *Flatiron Materials Co.*, 250 NLRB 554, 554 (1980); *Cooperativa de Credito y Ahorro Vegabajena*, 261 NLRB 1098 (1982). See also *Lipman Bros. Inc.*, 164 NLRB 850, 853 (1967); *Rikal West, Inc.*, 274 NLRB 1136 (1985).

Therefore, I find that the backpay period of March 27, 2013, to August 22, 2016, is appropriate.

2. Were the appropriate comparable employees used to calculate backpay?

The Region solicited payroll and other information from Respondent in an attempt to identify the appropriate comparable employee(s) on whose wages the Compliance Specification bases Hershey's backpay amount. Respondent provided the Region with payroll records for 11 drivers. Respondent employs two different types of truck drivers, who perform different types of work, which affected the amount of work available for each type of drivers. The labor agreement between Respondent and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union #614 (IBT labor agreement) sets different pay rates for these two types of drivers. Hershey drove a quad axle truck for Respondent. Therefore, I find, and Respondent and General Counsel agree, that the proper method of calculating backpay is by using another quad axle truck driver as a comparable employee.

General Counsel contends that Ronnie Smith, hired April 12, 2011, and Gary Forsyth, hired May 17, 2011, are the appropriate comparable employees for Hershey, who was hired more than a year later on July 26, 2012. Respondent contends that the appropriate comparable employee is Kevin Moore, Sr. with a hire date of May 31, 2012, less than 2 months before Hershey's. The compliance officer testified that he considered using Moore as the comparable employee, but notice that Moore and quad axle truck driver, Jeffrey Clem, hired June 5, 2003, had large unexplained gaps in their employment with Respondent. (Tr. 117–118; GC Exh. 11.) Based upon Clem's seniority status, which under the agreement would make him less likely to be laid off during those periods of time while other less senior quad axle drivers continued to work, I do not find that layoff by seniority for lack of work explains his gaps in employment. The compliance officer testified that Clem's gaps in employment called into question why these two employees with significantly different seniority status had gaps of in their employment histories. (Tr. 21–22.) General Counsel attempted to determine the reason for these gaps in employment by letters dated April 18, May 1, and June 2, 2017, requesting that Respondent provide the Region with layoff documents, recall documents, and any other documents that would explain the gaps in employment for Moore and any other employee.

(GC Exhs. 3, 4, and 5.) Respondent did not respond to any of these inquiries. (Tr. 22.)

Furthermore, Respondent presented no evidence at hearing and made no contentions in its Answer or brief in this matter to explain the gaps in Moore's employment. (GC Exh. 1(oo).) Instead, Respondent argues that General Counsel dismissed Moore as the appropriate comparable employee because Hershey would not receive backpay if Moore was used as the comparable employee without making any assertion as to why Moore had gaps in employment. (R. Br. at pgs. 8–10.) Respondent's general manager of operations and sales, David Laming, admitted that Respondent maintains time records for each employee. (Tr. 150–151; R. Exh. 10.) If there was an overall decrease in labor hours for quad axle drivers, Respondent would have been in a position to provide that evidence. Instead, Respondent presented no evidence and gave no explanation to support a finding that Moore's gaps in employment were based upon any reason that would have affected the availability of work for Hershey. Furthermore, the record reflects that Respondent hired and trained new quad axle drivers during the backpay period. (Tr. 146–147.) Therefore, Respondent failed to establish that Hershey's work schedule would reflect gaps comparable to Moore's had Hershey not been discharged.

As there is a failure on Respondent's part to submit evidence within its control that results in uncertainties and ambiguities, I resolve the doubts in favor of the wronged party rather than the wrongdoer. See *Kansas Refined Helium,* supra at 1157. Accordingly, I find that the Compliance Specification's average of the hours worked by Gary Forsyth and Ronnie Smith, the two next senior quad axle truck drivers, constitutes a reasonable "comparable employee "on which to base the hours of work used to calculate the backpay.[3]

3. Was the proper wage rate used to calculate backpay?

The IBT labor agreement sets the wage rate for quad axle drivers based upon years of service. For the most part, the Compliance Specification uses the IBT labor agreement wage rate which varies based upon years of service to determine how much Hershey would have earned if he had not been discharged. Respondent agrees that this is the appropriate rate for Hershey but disagrees with the few instances in the Compliance Specification where a higher wage rate is used. The payroll records for comparable employee Smith reflect that at some times he received $2 or more per hour than the IBT labor agreement wage rate for his years of service. (R. Exh. 1; GC Exh. at pg. 25.) Assuming that these variances in wages were a result of prevailing wage work with rates that exceeded the contractual wage rate, the Compliance Specification applied the increases to the wage rate used for calculating the backpay amount for the same periods based upon the assumption that the same increases would have also been available to Hershey.

Laming testified that he could not recall prevailing wage rate work during the applicable time period and claimed that the variances in Smith's wage rate were due to a flat $2 per hour premium for training new drivers. The training premium was available to Smith and other experienced drivers, who were willing to perform the training when available. (Tr. 146–147.) This testimony is not fully consistent with Smith's payroll records which periodically reflect wage rates more than $2 above the contractual amount. (R. Exh. 1.) Respondent never explained why the wage rate would have varied more than the $2 premium for training new drivers. More importantly, Respondent provided no evidence that Hershey, who had 35 years of driving experience, would not have been eligible for the $2 training premium or other increases in wages above the contractual wage rate that Smith enjoyed. (Tr. 133.)

I again resolve ambiguities in the record in the favor of the claimant and against the Respondent. See *Kansas Refined Helium,* supra at 1157. Thus, I find that the wage rates used in the Compliance Specification to calculate backpay are reasonable approximations of the wage rates that Hershey would have enjoyed if he had not been unlawfully discharged.

4. Was the overtime portion of the backpay calculated appropriately?

Respondent contends that the manner in which overtime pay was calculated in the Compliance Specification was unreasonable and arbitrary.[4] Respondent contends that it results in a backpay award for Hershey that arbitrarily puts him in a better financial position than if he remained employed by Respondent. Respondent contends that this is especially true in this case because Hershey received higher hourly wages at his interim employment than the contractual wage provided by Respondent. General Counsel contends that the method used to compute overtime pay liability is consistent with Board precedent and the Board's Compliance Manual policy not to deduct earnings from excess overtime worked by a claimant at interim employment even if this calculation seems to make the claimant more than "whole".

Respondent provided the Region with biweekly payroll information for the comparable employees. This information gave total regular hours and overtime hours for each 2-week payroll period. Respondent did not provide time cards or other information from which the Region could have derived the accurate regular and overtime hours to attribute to each week, nor did Respondent enter any such records into evidence.

To compare the available payroll information to Hershey's interim earnings, the biweekly totals for each of the comparable employees were divided by two and equal amounts of regular hours and overtime hours were allocated to each week of the payroll period. Then the two comparable employees' regular hours and overtime hours were averaged for each week. During the periods that Hershey's interim employment was compensated bi-weekly, his regular hours and overtime hours were divided by two and equally allocated to each week in the same

[3] I also find that the Compliance Specification meets the required reasonable standard in its reliance upon only Smith's payroll history for periods during which Forsyth was performing dispatch and not quad axle driving work. (Tr. 24; GC Exh. 1(qq), fn.1.)

[4] Respondent did not dispute the formula used to calculate backpay bonuses other than its contention that the wrong comparable employees were utilized. Because I found the use of the average of the two employees' payroll information was a reasonable basis for calculating the backpay liability under the circumstances of this case, I find that basing the backpay bonus amounts due on the average of the comparable employees' bonuses also is reasonable.

manner. Much of his interim employment was compensated weekly; therefore, the totals for those individual weeks were utilized in the Compliance Specification. I find the method used to allot regular and overtime hours to individual weeks in the Compliance Specification is reasonable based upon the information provided by Respondent for this purpose.

The average regular and overtime hours for the comparable employees for each week in the backpay period were used in the Compliance Specification to compare overtime work to Hershey's interim overtime hours on a weekly basis. If Hershey worked more overtime hours at his interim employment for any week, the pay for the overtime hours that exceeded the average comparable overtime hours was not subtracted from the backpay liability. If Hershey worked less overtime hours than the average of the comparable employees, the pay for the overtime hours that exceeded the overtime hours worked by Hershey that week was included in the backpay liability. Schedule D of the Compliance Specification calculates the gross backpay liability to be $19,144 using this method.[5] (GC Exh. 1(qq), pg. 41.)

Respondent objects to this week-by-week comparison and contends that the overtime portion of the backpay liability should be calculated on a quarterly basis, similarly to how the backpay liability for regular hours was computed in the Compliance Specification. Respondent contends that the total of the average overtime hours for the comparable employees over each quarter should be deducted from the total overtime compensation that Hershey earned at interim employers for each quarter as was done with the regular hours, which results in lower backpay liability. Yet, the backpay liability numbers provided by Respondent do not rely upon quarterly calculations but rather it offsets quarters of lower interim earnings than backpay liability with quarters of higher interim earnings than backpay liability. (Tr. 115; GC Exh. 1(oo), pg. 8 of Spreadsheet 1, Net Backpay calculation column.) Indeed, Respondent's own calculations show five quarters during which Hershey's total interim earnings were less than the backpay liability for those quarters, totaling a backpay liability of $16,507.12. Id. Thus, Respondent's calculations ignore long standing Board precedent that holds that interim earnings that exceed gross backpay in any quarter are not applied against gross backpay in any other quarter. See, *F. W. Woolworth Co.*, 90 NLRB 289, 293 (1950); see also, NLRB Casehandling Manual (Part Three) Compliance, Sec. 10564.3. Thus, the difference between the Compliance Specification's and the Respondent's calculation of the gross backpay by quarters is $2,637.

This difference in quarterly gross backpay sums is a result of the Compliance Specification's weekly comparison of overtime hours. In asserting that this is the correct method to calculate backpay liability, General Counsel relies upon the Board's Compliance Manual Section 10554.3, entitled "Interim Earnings Based on Hours in Excess of Those Available at Gross Employer Not Deductible," which states:

> In cases where a discriminatee worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay Citing, *United Aircraft Corp.*, 204 NLRB 1068, 1073–1074 (1973); See also *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989) (Interim earnings from hours worked in excess of hours available at the respondent employer should not be deducted to reduce backpay liability).

In *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989), the Board held that a "backpay claimant who 'chooses to do the extra work and earn the added income made available on the interim job' may not be penalized by having those extra earnings deducted from the gross backpay owed by the Respondent." Citing, *United Aircraft Corp.*, 204 NLRB 1068, 1073 (1973). In *United Aircraft,* the Board enforced the administrative law judge's finding that

> supplemental earnings from a "moonlighting" job constitute an exception to the rule that interim earnings are deductible from gross backpay, supplemental earnings from "excess overtime" on an interim job should likewise constitute an exception. Earnings from such extra effort, whether exerted on "excess overtime" or a "moonlighting" job, should operate to the advantage of the backpay claimant, not of the employer required to make him whole for a discriminatory discharge. Moreover, if [a discriminatee's] backpay plus 'excess overtime' seems to make him more than "whole," it is as a result of his extra effort above and beyond his performance of a full-time job, not because the [r]espondent is required to do more than make him whole for the loss of earnings suffered as a result of his unlawful termination.

In *Regional Import & Export Trucking Co.*, 318 NLRB 816, 818 (1995), the Board reaffirmed this approach and held "*any pay for hours worked* for any employer during the backpay period *in excess* of those hours which [the backpay claimant] would have worked at the Respondent Employer should be considered supplemental income and should not be deducted as interim earnings." (Emphasis added.) See also, *Center Service System Division*, 355 NLRB 1218, 1221 (2010). The Board in *United Aircraft* held that such overtime work should "operate to the advantage of the backpay claimant, not of the employer required to make him whole for a discriminatory discharge." This is what was done in the Compliance Specification.

Thus, I find that the Compliance Specification's comparison of weekly overtime hours to determine if there was overtime pay for hours worked for an interim employer in excess of those hours which Hershey would have worked for Respondent and vice versa is an appropriate method of calculating overtime hours. I also find that the Compliance Specification is correct in not deducting the pay for the overtime hours performed by Hershey at interim employers in excess of what was available if he was employed by Respondent. Furthermore, I find that the Compliance Specification correctly included backpay liability for any overtime hours that were available at Respondent in excess of the overtime hours worked by Hershey at interim employers on a weekly basis.

[5] In Schedule E, the gross backpay for each week is reduced by 5% for the contribution to the 401(k) plan in which Hershey had participated prior to his discharge, resulting in a net backpay liability of $11,683. (GC Exh. 1(qq), pg. 53.)

5. Was it appropriate not to deduct union dues, uniform fees, and unemployment benefit payments to Hershey from the backpay liability figure?

Respondent contends that the failure to deduct union dues, uniform fees and unemployment benefit payments from the backpay figure in the Compliance Specification was unreasonable. I find that none of these amounts should have been deducted from the backpay figure. First, employees earn a particular amount of pay and may or may not under the circumstances owe union dues to a union.[6] Thus, in determining how much Respondent owes Hershey in backpay, any possible obligation that Hershey may have to pay dues to a union is not factored into that calculation. Respondent did not assert that under these circumstances it was under some duty to remit dues pursuant to the IBT labor agreement on Hershey's behalf and would do so. Instead, Respondent contended that Hershey should not get the benefit of this amount in a backpay calculation because if he was still employed, Respondent would deduct dues from his pay. What Respondent fails to consider is that its unlawful discharge of Hershey prevented him from enjoying any benefits of being a union member while working for Respondent. Accordingly, I find no merit to the argument that union dues should be deducted from the backpay calculation.

Second, Respondent argued for the first time at the hearing that uniform fees should have been deducted from the backpay figure, because Respondent deducts from its drivers' pay a monthly uniform expense fee. General Counsel asserts that Respondent, by failing to raise this defense in its Answer to the Compliance Specification or by requesting to amend its Answer at hearing to include this defense, waived this argument. (GC Exh. 1(oo).) As support, the General Counsel cites to Board's Rules and Regulations Section 102.56(b) and (c); *Airports Service Lines*, 231 NLRB 1272, 1273 (1977); *Baumgardner Co.*, 298 NLRB 26 (1990). I agree with General Counsel that Respondent failed to meet its burden to raise this defense in its Answer or request to amend its Answer as required under Board regulations and precedent. I also find that Respondent's unlawful discharge of Hershey prevented him from getting the benefit of wearing the uniform required by Respondent; therefore, it is unreasonable to deduct that amount from the backpay amounted due to him. Thus, I find that the uniform fees were correctly not deducted from the backpay amount in the Compliance Specification.

Finally, Respondent contends that the amount of money that Hershey received in unemployment insurance benefits should have been deducted from his backpay amount. Board precedent clearly establishes that "[u]nemployment compensation payments are not interim earnings under Board law." *Paint America Services,* 353 NLRB 973, fn. 5 (2009). See also, NLRB Casehandling Manual (Part Three) Compliance, Sec. 10554.1 ("Unemployment insurance payments are collateral benefits; as such, they are not interim earnings and are not offset against gross backpay.") Citing, *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *Paint America Services,* 353 NLRB 973 (2009). Accordingly, I find that any money Hershey may have received in unemployment benefits during the backpay period was correctly not deducted from the gross backpay figure in the Compliance Specification.

B. Were the interim expenses correctly not offset by interim earnings and reasonably calculated?

The interim expenses in the Compliance Specification consist of expenses Hershey incurred in commuting to and from work at interim employers in excess of what General Counsel contends Hershey would have traveled to work for Respondent. (GC Exh. 1(qq).) Respondent does not contend that the Compliance Specification is incorrect in the formula or mileage amounts for the various locations used to calculate the interim expenses. Instead, Respondent contends that interim expenses are not warranted in the instant case pursuant to the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), and that the interim expenses in the Compliance Specification were derived from mileage information from the wrong facility of Respondent. (Tr. 146; GC Exh. 1(oo).)

Respondent asserts that the Board's holding in *King Soopers* does not apply to the instant case because Hershey was not similarly situated to the two example situations used by the Board in *King Soopers* to illustrate its point that interim expenses should not be offset by interim earnings. Id. slip op. at 5. The Board used two examples to highlight the injustice of offsetting interim expenses against interim earnings especially in certain circumstances. First, the Board noted that discriminatees who were unable to find interim employment did not receive any compensation for their search-for-work expenses. Second, the Board noted that discriminatees who found jobs that paid lower than their expenses did not receive full compensation for their search-for-work and interim employment expenses. Respondent misreads the Board's holding in *King Soopers* to apply only when the discriminatee is similarly situated to the hypothetical discriminatees in these two examples. To the contrary, the Board used these two worst case scenarios to highlight the need for the change in its precedent, but it did not find that its holding was limited to these circumstances. Instead, the Board stated that respondents are liable for interim expenses in the same manner that they are liable for other expenses, (i.e. medical expenses and retirement fund contributions) incurred as a direct result of being unlawfully discharged without those expenses being offset by interim earnings. Id. slip op. at 6. Therefore, just as a discriminatee would be compensated for medical expenses incurred as a result of an unlawful discharge, despite the fact that the discriminatee made a higher wage from an interim employer, travel expenses to an interim employer should not be offset against interim earnings. See *JG Restaurant Ventures, LLC, d/b/a Big Louie's Pizza,* 365 NLRB No. 144, slip op. at 3 (2017) (Board orders that search for work and interim employment expenses shall be calculated separately

[6] Respondent claims that Hershey would have been required to pay union dues under the IBT labor agreement's Article 1, Union Shop and Dues provision. General Counsel contends that because Michigan, where Hershey worked, passed the Michigan Freedom to Work Act that would have relinquished any requirement to pay dues in order to continue to be employed by Respondent. I find it is unnecessary to determine the effect of this law on the IBT labor agreement, because regardless of the effects of this state statute, I find it inappropriate to deduct the dues from the backpay liability for the reasons discussed herein.

from taxable net backpay.) Thus, contrary to Respondent's argument, I find that the interim travel expenses in the Compliance Specification were correctly not offset by Hershey's interim earnings.

Respondent also contends that Hershey would have reported for work during the entire backpay period at its Flat Rock, Michigan facility not its Pontiac, Michigan facility. The distance from Hershey's home to the Pontiac facility was used to determine interim expenses in the Compliance Specification, not the distance from Hershey's home to the Flat Rock facility which is farther from Hershey's residence than his interim employment was located.

In the fall of 2012, Hershey was working at Respondent's Pontiac facility, but as the winter months approached, work for quad axle drivers decreased at the Pontiac facility. Respondent offered Hershey and other employees, who normally reported to the Pontiac facility, temporary work out of its Flat Rock facility, which was approximately an hour commute each way. Hershey contends that he and four other employees, who accepted the work out of the Flat Rock facility, were told that they would be compensated in some form for the extra commute to the Flat Rock facility. Hershey also testified that he was instructed by dispatcher Tony Allen to report to the Pontiac facility every morning before going to the Flat Rock facility and to return to the Pontiac facility every evening to turn in paperwork. (Tr. 124–125, 132, 156–157.) There is no dispute that Hershey was never compensated by Respondent for the extra commute to the Flat Rock facility. I credit Hershey's testimony that he believed he was required to report to the Pontiac facility before and after commuting to Flat Rock each day. No direct evidence was submitted to rebut this claim and Hershey acted consistent with that belief by reporting to the Pontiac facility throughout the time he worked out of the Flat Rock facility. I find it unnecessary to resolve the issue of whether Hershey's reporting to the Pontiac facility resulted in a legal requirement for Respondent to reimburse Hershey and the other employees for their commute time between the Pontiac and Flat Rock facilities.

Hershey testified that he and the other employees were told that the Flat Rock work was temporary, and Respondent presented no evidence to contradict this testimony. (Tr. 157.) Hershey also testified that approximately 1 month after he was discharged, while performing work for an interim employer, he passed the worksite at which he performed work out of the Flat Rock facility. Hershey witnessed another company's vehicles performing the work that he and other employees of Respondent had been performing. (Tr. 127.) Respondent never directly contradicted that the work Hershey was performing out of the Flat Rock facility had discontinued. Instead, Respondent contended that Hershey would have continued to work on some series of jobs out of the Flat Rock facility throughout the backpay period without submitting any invoices, time records or any other evidence to support its assertion. The only evidence submitted was testimony by general manager Laming in response to leading questions by Respondent's counsel that until some undefined time before the hearing there was at least one Lou's Transport employee driving from the north to perform work at the Flat Rock facility. (Tr. 146, 152, 153–154.) Despite Laming's testimony that Respondent maintains employee time cards, Respondent presented no evidence as to the number of employees performing this work, the seniority of those employees, or a lack of work for Hershey at the Pontiac facility. Again, I construe the ambiguity of the evidence in favor of the wronged party and not the wrong-doer and find that the Compliance Specification utilized the appropriate facility of Respondent for calculating mileage to determine interim travel expenses.

Accordingly, I find that the interim travel expenses are correctly not offset by Hershey's interim earnings and reasonably calculated in the Compliance Specification.

C. Were the 401(k) benefits correctly included in the total backpay liability and reasonably calculated?

Before being discharged, Hershey participated in the 401(k) plan provided by Respondent as a benefit of his employment pursuant to the IBT labor agreement. (Tr. 29; GC Exh. 6, pg. 32; GC Exh. 7, pg. 32.) Hershey regularly contributed 5% of his income to the plan and received a matching contribution of 0.5% from Respondent. Hershey's interim employers did not offer pension benefits until he started employment with the Road Commission for Oakland County in November of 2015. Since he became eligible, Hershey has contributed to the Road Commission's 401(a) plan. (Tr. 29, 33, 129; R. Exh. 8.)

Respondent contends that the inclusion of compensation for loss of 401(k) benefits in the Compliance Specification constitutes speculation on top of speculation.[7] First, Respondent contends that it is mere speculation that Hershey would have continued to contribute to the 401(k). I agree that it is impossible to know whether Hershey would have consistently contributed to a 401(k) fund during the backpay period, but the inference that he would do so is based upon his consistent practice of contributing to the 401(k) fund while employed by Respondent and his election to again contribute to his current employer's 401(a) plan, the first available to him through his employment since his discharge. When, as here, a claimant's prior conduct supports an inference that they would have acted in a consistent manner, the benefit of doubt goes in favor of the aggrieved and against the wrong-doer. See, *Webco Industries, Inc.*, 340 NLRB 10, 11 (2003) (Board found employee's historical percentage of time for which he qualified for attendance bonuses while working for the respondent was a reasonable

[7] Respondent also contends that because the 401(k) compensation liability was not included in the compliance specifications issued by the Region until the fourth amended compliance specification issued, it is somehow inappropriate to award compensation for any loss of 401(k) benefits. The fact that earlier drafts of the Compliance Specification may have been inaccurate and/or incomplete does not alter the purpose of the compliance proceeding in enforcing the Board's order "to make Hershey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him." Indeed, Board precedent allows a second compliance specification and a second compliance hearing when it is necessary to address all the compliance issues. See, *Domsey Trading Corp.*, 357 NLRB 2161, 2161 fn. 1 (2011); NLRB Casehandling Manual (Part Three) Compliance, Sec. 10654.1. Therefore, I find no merit to Respondent's objection to the inclusion of compensation for the loss of 401(k) benefits in the Compliance Specification at issue.

basis for projecting the percentage of time he would have received an attendance bonus if his employment had not unlawfully been terminated). Thus, I find that the Compliance Specification correctly assumes that Hershey would have continued to contribute 5 percent of his income to a 401(k) fund provided by Respondent and to receive the 0.5 percent match from Respondent, because it is based upon his contribution history while employed by Respondent. I further find that calculating the contribution amounts based upon the estimated gross backpay is a reasonable calculation method based upon the available evidence.

Second, Respondent contends that the 401(k) profits calculated in the Compliance Speculation are also based upon multiple levels of speculation. Again, I agree that the calculations are based upon speculation, but that is the nature of attempting to recreate the past in compliance specifications. The NLRB Casehandling Manual (Part Three) Compliance, Sec. 10544.3, specifically requires the inclusion of retirement benefits, including 401(k) benefits, in the make whole compliance specifications and notes that the evidence to make such calculations can be difficult to obtain. As noted above, the "Board is required only to adopt a formula which will give a close approximation of the amount due; it need not find the exact amount due." *Performance Friction*, supra at 1117. See also, *Design Originals, Inc.*, 343 NLRB 115, 117 (2004) (ordering the employer to make claimants whole for contractual contributions to 401(k) and any loss of interest they may have suffered as a result of the failure to make such payments).

The Compliance Specification estimates the lost 401(k) contributions from the beginning of the backpay period through November 2015, when Hershey had access to a 401(a) plan through an interim employer, and estimates the 401(k) profits through the third quarter of 2017 when the hearing took place.[8] Schedule H of the Compliance Specification estimates the 401(k) compensation liability as $11,513 by totaling $7,461 in employee contributions, $746 in employer contributions, and $3,306 in projected profits through the time of the hearing. (GC Exh. 1(qq), Schedules F, G, and H.)[9]

The compliance officer testified that he attempted to use the Securian quarterly rate of returns to calculate the profits, but was informed that the Securian fund no longer exists and the rates of returns were not available. (Tr. 31, 105.) Instead, the compliance officer used the Vanguard 500 fund's rate of return to estimate the profits, because it is a domestic equity fund similar to the Securian equity fund and that it publishes its quarterly rates of return, which are necessary for calculating the estimated profits. The Vanguard 500 fund is an equity fund like Securian was. During the relevant period, the Vanguard 500 closely approximated the S&P 500 but performed slightly weaker than the S&P 500. Both of the Vanguard 500's gains and losses were used to calculate the approximate profits that Hershey would have enjoyed if he had been allowed to continue contributing to the Securian equity fund or another fund offered by Respondent. (Tr. 31–32, 106, 108.)

Respondent contends that the Compliance Specification should have used the rates of returns by one of the other 401(k) funds offered to Respondent's employees, but again submitted no evidence to support its apparent assertion that these funds rate of returns were substantially different than the Vanguard 500. The record is silent as to when the Securian equity fund ceased to be offered by Respondent, the names or types of the other 401(k) funds offered by Respondent, any evidence that their quarterly rates of return were available and/or substantially different than the rates of the Vanguard 500 fund used in the Compliance Specification.

I find the compliance officer's use of the Vanguard 500's quarterly rates of return reasonable in light of the unavailability of Securian's rates of return, because it was an equity fund similar to the fund offered by Respondent and it had available quarterly rates of return. Furthermore, Respondent presented no evidence in its Answer to the Compliance Specification or at hearing to support a finding that the use of the Vanguard 500's quarterly rates of return does not result in a reasonable approximation of the rate of return that Hershey would have enjoyed if he was not unlawfully discharged.

Accordingly, I find that the method used to calculate the estimated employee contribution, employer matching contribution, and 401(k) profits in the Compliance Specification is reasonable and the resulting amounts were correctly included in the total backpay liability.

D. Were consequential economic damages as a result of Hershey withdrawing funds from 401(k) correctly included in the total backpay liability?

General Counsel contends that because of his discharge Hershey suffered economic hardship, and as a result, he withdrew the $753 that existed in his 401(k) shortly after his discharge. (Tr. 109–110, 131; GC Exh. 9 and 10.) The economic consequences of the withdrawal of the 401(k) funds are calculated in the Compliance Specification as consisting of a $75 early withdrawal fee and $420 in estimated profit losses. (Tr. 47–50; GC Exh. 1(qq), para. 16 and Schedule I.) I agree with General Counsel that the early withdrawal penalty fee and any loss of profits due to the withdrawal of the 401(k) funds are consequential damages as a result of an action taken by Hershey which was not in the direct control of Respondent. As the General Counsel concedes, the Board's order in this matter does not require Respondent to reimburse Hershey for consequential damages. As the Board has recognized, current Board precedent does not authorize it to award consequential damages. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016).

Accordingly, I find that the consequential damages were improperly included in the Compliance Specification.

[8] Within a few months of his discharge, Hershey had the option to withdraw or roll the value of the Securian 401(k) fund to another pension fund vehicle. As discussed below, Hershey elected to withdraw the value of his fund. (Tr. 109–110: GC Exh. 9.) Therefore, the calculations for the value of his 401(k) funds in the Compliance Specification start at zero on the date of his discharge.

[9] The $7461 in employee contributions was deducted from gross backpay resulting in the net backpay figure discussed above. Therefore, only the employer contribution and projected profits totaling $4,052 operates as an increase in the overall backpay liability.

SUPPLEMENTAL ORDER

It is hereby ordered that Respondent, Lou's Transport, Inc. and T.K.M.S., Inc., its officers, agents, successors, and assigns, shall pay Michael Hershey the following amounts, which totals $49,817, plus interest accrued on the net backpay, bonuses, and interim expenses to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax and withholdings required on the backpay and bonuses by Federal and State laws.

Net Backpay:	$11,683
Bonuses:	$ 5267
Interim Expenses:	$21,354
401(k) Non-taxable Distribution:	$11,513
TOTAL:	$49,817

It is further ordered that Respondent reimburse Michael Hershey for any additional estimated lost 401(k) profits to the date of payment to be calculated by using the same method to calculate lost 401(k) profits set forth in the Compliance Specification.

It is further ordered that Respondent reimburse Michael Hershey for any adverse tax consequences, of receiving a lump-sum backpay award calculated for the calendar year in which the payment is made, allocating the backpay award to the appropriate calendar years as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).[10]

Dated, Washington, D.C. January 25, 2018

[10] Schedule J of the Compliance Specification calculates that there would have been no adverse tax consequences as a result of Hershey receiving the lump-sum back payment calculated in the Compliance Specification in 2017, but that calculation may change based upon the year in which the payment is rendered.